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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1361

NATIONAL CAPITAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD AND WASHINGTON AIRWAYS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1–C18) is reported at 419 F. 2d 668. The opinion of the Board (Pet. App. B1–B42) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1969. A petition for rehearing was denied on October 28, 1969. On January 14, 1970, the Chief Justice extended the time within which to file a petition for a writ of certiorari to March 27, 1970, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

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QUESTION PRESENTED

Whether the Board properly approved and certified a consortium formed by several major airlines to provide helicopter service in the Washington-Baltimore area.

STATUTE INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958 (72 Stat. 737, as amended, 49 U.S.C. 1301, *et seq.*) are set forth in the Appendix to the petition (Pet. App. A1–A11).

STATEMENT

The Civil Aeronautics Board on August 29, 1966, ordered an investigation to determine the need for and feasibility of scheduled helicopter service, without federal subsidy, in the Washington-Baltimore area, and to determine which applicant, if any, should receive authorization to perform the service. Order E-24133. The order made all the trunk line and regional air carriers authorized to serve the three Washington and Baltimore airports parties to the investigation, and it directed that all applications to provide such service be filed within thirty days. Pursuant to this order, petitioner and ten other applicants, none of whom were certificated fixed-wing carriers or contemplated financial support by fixed-wing carriers, filed with the Board (Pet. App. C5). Subsequently, ten fixed-wing carriers serving the Washington-Baltimore area [1]—having been granted an extension of time

[1] The subsequent merger of Allegheny and Lake Central left nine fixed-wing carriers in the consortium (Pet. App. B31, n. 44).

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by the Board—filed an application on June 19, 1967, seeking a certificate of convenience and necessity for the jointly owned Washington Airways, Inc. ("WAI") (J.A. 93).[2] The application was accompanied by a request for Board approval, under Section 408 of the Federal Aviation Act, of the ownership agreement among the ten carriers; the airlines owned all the stock, subject to a limitation that no carrier contribute more than $500,000 in equity capital (Pet. App. B32). Since it was expected that WAI would incur operating losses for some time, the agreement provided the method of apportioning the losses, and it stipulated that WAI would seek a certificate to cease operations if its aggregate losses should exceed $8,000,000 or single-year losses should exceed $2,250,000 (*ibid.*).

The hearing examiner, after appraising both the need for the proposed service and the plans of the five remaining applicants,[3] found that helicopter service in the Washington-Baltimore area would be "a luxury service for a relatively few users" and would not be

[2] WAI's application was consolidated for hearing and disposition with the other applications under investigation (Pet. App. B31–32).

[3] Several of the applicants had by this time dropped out of the proceeding. Petitioner's suggestion that the formation of the airline consortium caused the withdrawal of two of the independent applicants (Pet. 6) is without support in the record. One of these applicants, Chesapeake & Potomac Airways, gave no reason for its withdrawal (J.A. 150). Capital Helicopter Airways and Chicago Helicopter Airways, which were jointly represented in the proceedings, said only that a review "of a number of recent developments", including the consolidation of WAI's application, dissuaded them from prosecuting their application (J.A. 151).

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self-supporting in the reasonably foreseeable future (J.A. 409, 395).[4] He therefore concluded that there was no need for the proposed service (Pet. App. B3).

The Board, reviewing the decision upon its own initiative, disagreed with the hearing examiner's conclusion; it found, after an examination of the record, that the public convenience and necessity do require the proposed service (Pet. App. B40). The Board agreed with the examiner, however, "* * * that substantial losses will occur in the immediate future from the operation of such services, and that such losses may continue for a substantial period of time" (Pet. App. B10). Accordingly, it held, and all the parties agreed, that the market justified the certification of only one applicant (Pet. App. B23). Because the cost of entry into helicopter service is high and because the recipient of the authority would have to be able to absorb substantial losses for some time, the Board considered that "the factor of financial strength is of paramount importance in our selection of a carrier * * *" (Pet. App. B23).[5] Analysis of the financial positions of the five applicants led it to the conclusion that WAI was clearly the strongest (Pet. App. B29). The Board therefore awarded a five-year

[4] None of the helicopter services which the Board has authorized (in Los Angeles, San Francisco, Chicago and New York) has been able to operate without heavy financial support either from the United States or from the fixed-wing carriers (J.A. 338–341).

[5] The Board found that to the extent there were any differences among the five applicants with regard to management, experience, and operating proposals, there was no superiority in these areas sufficient to warrant selection of a carrier which was less fit financially (Pet. App. B23–24).

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certificate to WAI and, subject to conditions to protect against anticompetitive effects,[6] approved the various control relationships under Sections 408, 409 and 412 of the Federal Aviation Act (Pet. App. B41). The Board specifically retained jurisdiction over WAI as a safeguard against any discriminatory practices (Pet. App. B36).

On review, the court of appeals unanimously affirmed (Pet. App. C1–C18).

ARGUMENT

The Board fully complied with applicable statutory requirements in certificating WAI. The court below properly upheld the Board's determination, and there is no reason for further review.

1. Petitioner erroneously complains that, by approving the creation of WAI under Section 408 of the Act, the Board approved a monopoly (Pet. 10–11). It is true that the Board under Section 401 certificated only one carrier for the Washington-Baltimore helicopter service; and thus the chosen carrier has a regulated monopoly.[7] But the Board found, and petitioner agreed, that the market could support only one carrier (Pet.

[6] The Board required that any carrier serving, or later authorized to serve, the Washington-Baltimore area be permitted of right to participate in the WAI consortium (Pet. App. B34–35). It noted with approval WAI's proposed "interval scheduling policy" by which the company would schedule flights at regular intervals rather than gear them to the arrivals and departures of particular fixed-wing flights (Pet. App. B34). The Board also authorized the continuance of scheduled and nonscheduled inter-airport air taxi operations which compete with the helicopter service (Pet. App. B8).

[7] The monopoly is regulated because the power to set prices and to control entry lies with the Board, not with the carrier.

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App. B23). Indeed, the Board has never certificated more than one helicopter service in any market, and the helicopter operations which it has certificated have never paid for themselves. Had petitioner—or any other applicant—prevailed before the Board, it would hold the same monopoly of which it now complains. Thus, refusal under Section 408 to approve the formation of WAI would not have avoided a monopoly in the hands of whichever applicant, if any, received Section 401 certification.

Petitioner's suggestion (Pet. 11) that the mere formation of the joint venture in itself constituted a forbidden monopoly is in error. The first proviso of Section 408(b) requires the Board to withhold its approval of any acquisition of control only if it "* * * would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party * * *" (49 U.S.C. 1378(b)). As this Court has pointed out, a monopoly is not an abstraction, but exists only in relation to some market. *Walker Process Equipment, Inc.* v. *Food Machinery Corp.*, 382 U.S. 172, 177–178; *United States* v. *du Pont & Co.*, 351 U.S. 377; see, also, *United States* v. *Aluminum Company of America*, 148 F. 2d 416 (C.A. 2). The market here is helicopter service in the Washington-Baltimore area (Pet. App. C14). "Monopoly" here resulted not from the formation of the consortium in 1967 but from the Board's certification of WAI under Section 401; until the Board in 1968 authorized the service the consortium could not even enter the market.

Since the Board's approval of the formation of WAI in no way contravened the first proviso of Section 408(b), petitioner's argument is reduced to the contention that certification of this joint venture, rather than of an independent carrier, imposes restraints upon competition in violation of antitrust laws and policy. The "public interest" standard of Section 102 of the Act requires the Board to consider competitive factors in its decisions and to approve a transaction if "'* * * it finds the disadvantage of any curtailment of competition to be outweighed by 'the advantages of improved service.' *McLean Trucking Co.* v. *United States, supra,* 321 U.S. at 87." *Butler Aviation Company* v. *Civil Aeronautics Board,* 389 F. 2d 517, 519 (C.A. 2). The Board in this case did not neglect to consider possible anticompetitive effects, and its analysis is sound.

The Board concluded that the public convenience and necessity require this helicopter service. Since no helicopter service thus far instituted has been able to show a profit, the Board reasonably determined that the recipient of this certificate must be able to bear substantial losses for a substantial period of time (Pet. App. B10). The Board specifically found that, of all the applicants, only WAI, with its strong financial backing and ability to spread anticipated losses among its backers, could absorb the initial losses and still provide adequate service to the public (Pet. App. B29). Thus, certification of the WAI joint venture brings to the public the promise of service not other-

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wise available. See *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 170.[8]

Plainly the certification of WAI eliminates no actual competition in the relevant market; there is no dispute that one carrier, at most, can presently hope to succeed there. In the face of this, petitioner attempts to argue that the formation of the WAI joint venture eliminated potential competitors from the Washington-Baltimore helicopter market (Pet. 11-12). But the record here shows no such risk.

Petitioner's undocumented claim (Pet. 13) that several of the trunkline carriers are potential entrants into this type of helicopter market is unfounded. Nothing in the history of such services supports this contention. No fixed-wing carrier is presently providing helicopter service in any market, nor has any

[8] The traditional arguments as to why joint ventures may cause anticompetitive effects have relatively little force when applied to the present situation. For example, critics of joint ventures point out that there is a risk that the parents will extend their cooperation beyond the joint venture, or that they will stifle the subsidiary if it competes in markets which they serve. See Pitofsky, *Joint Ventures Under The Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 Harv. L. Rev. 1007, 1013–1014 (1969). Here, however, all the parents are subject to Board regulation, and the Board has retained jurisdiction to make sure that the parent carriers do not abuse their position (Pet. App. B36). Nor do the parents have any apparent incentive to stifle development of WAI, which will provide services which are not offered by the carriers and are usefully complementary to the carriers' city-to-city service. Moreover, where, as here, the agreement is to share anticipated losses in a new market, there is ordinarily far less anticompetitive danger than might result from agreements to use joint market power to divide anticipated profits. Cf. Turner, *The Scope Of Antitrust And Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207, 1210 (1969).

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carrier fully prosecuted an application to provide helicopter service on an individual basis.[9] And even if one of the parent carriers would have competed for certification but for the formation of the consortium, the record conclusively shows that no carrier would have remained as a potential entrant after the Board had awarded a certificate. The market can sustain only one carrier, and its foreseeable prospect is for substantial losses. In short, this is a monopoly dictated by economic necessity; unless and until economic circumstances change materially, no carrier outside the market may fairly be characterized as a potential entrant.

While expecting a substantial period of unprofitability in this market, the Board nonetheless was alert to the benefits of competitive service when and if it should become feasible. It authorized the continued operations of air taxis in the Washington-Baltimore

[9] In 1948 United Airlines requested dismissal of its application before oral argument in the *Chicago Helicopter Service Case*, 9 C.A.B. 687. Allegheny Airlines filed an application in the earlier *Washington, D.C., Helicopter Service Case*, 38 C.A.B. 823, but the Board denied it with the other applications denied at that time. Petitioner points to the alleged interest of American Airlines in entering this market in the present case (Pet. 12). While it is true that American on February 17, 1967, filed for an amendment of its certificate to cover this helicopter service (J.A. 40), the request was clearly subsidiary to its much longer motion for extension of time which it filed the same day (J.A. 44). In this motion American asked a 30-day extension "so that it can canvass other carriers to see whether it would be possible to develop a jointly-held corporation to own and operate such services" (J.A. 45). American said it wished its application for certificate amendment to be consolidated into the proceeding only if the effort to develop a joint venture failed (J.A. 45).

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area after WAI starts to fly (Pet. App. B8), and it has retained jurisdiction with full authority to certificate a competing service whenever changed circumstances might so warrant (Pet. App. B36, n. 50).

2. There is no conflict among the circuits. The court below held that WAI's monopoly is the result not of the formation of this joint venture (or of Section 408 approval thereof), but of certification under Section 401 to serve a market which can support only one operator (Pet. App. C14–C15). In upholding the Board's decision, the court took its guidance from *Butler Aviation Company* v. *Civil Aeronautics Board,* 389 F. 2d 517 (C.A. 2), on which petitioner relies. In that case the court held that a transaction is not within the prohibition of the first proviso of Section 408 (b) unless it creates a monopoly and that monopoly restrains competition. *Id.* at 519. The opinion of the court below is fully consistent with *Butler,* for it held that the formation of WAI did not create the monopoly, which is attributable only to Section 401 certification in a one-carrier market, and that this joint venture therefore does not fall within the proviso's ban (Pet. App. C14–C15). In the two other cases cited by petitioner, *Northwest Airlines* v. *Civil Aeronautics Board,* 303 F. 2d 395 (C.A.D.C.), and *National Aviation Trades Association* v. *Civil Aeronautics Board,* No. 22,602 (C.A.D.C., decided October 2, 1969), the

court concluded, as here, that the transaction in question did not create a monopoly.[10]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1970.

[10] This is not to say that the court below otherwise neglected competitive factors in reviewing the Board's decision to certificate WAI. On the contrary, the court carefully examined the Board's appraisal under Section 102 of competitive factors, and upheld the Board's conclusion that the certification, as conditioned by the Board, would not injure competition (Pet. App. C15–C17).

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